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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 824

ADA J. VANT and WALTER J. VANT, Petitioners,

v.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Ada J. Vant and Walter J. Vant, petitioners, respectfully pray that a writ of certiorari issue in the above captioned case directed to the United States Court of Appeals for the Third Circuit to review its judgment dated and entered December 31, 1958 (App. 2); and the Order denying Petition for Rehearing dated and entered February 16, 1959.

OPINIONS BELOW

The order of the United States District Court for the Western District of Pennsylvania, which was the subject of the appeal, was not accompanied by an opinion and the case is not reported. The opinion of the United States Court of Appeals for the Third Circuit is reported in 262 F. 2d 803, and is appended hereto (App. 1-2). The proceedings and appendices in the prior appeal on the same action were incorporated by reference. The order of the United States District Court for the Western District of Pennsylvania therein was not accompanied by an opinion and the case is not reported; and the opinion of the United States Court of Appeals for the Third Circuit in said prior appeal is reported in 255 F. 2d 263, and is appended hereto (App. 3-6).

JURISDICTION

The judgment sought to be reviewed (App. 2) was dated and entered December 31, 1958.

The Order of the Court of Appeals denying the Petition for Rehearing, which was not accompanied by an Opinion, was dated and entered February 16, 1959. Therefore, the expiration date for the filing of this petition for writ of certiorari is May 18, 1959.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C., Section 1254(1); and the general supervisory power of this Court over lower Federal Courts.

QUESTIONS PRESENTED

1. When a District Court Order granting a Motion to Dismiss the Complaint has been affirmed by the Court of Appeals, and an Amendment to the Complaint which conforms to the Opinion of the Court of Appeals has been filed in the District Court, should not an unauthorized Motion of the defendant to strike the Amendment to the Complaint be denied and plaintiffs' Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure be granted if only for the reason that the defendant has failed to and waived the right to plead to or otherwise defend the Complaint as amended pursuant to said Rules; and does not the erroneous granting of such a motion to strike and the denial of such a motion for summary judgment conflict with the Law of the Land?

2. When, in the course of oral argument before the Court of Appeals on preliminary motions, it is stipulated that the case should stand submitted on the merits of the appeal as well as on the preliminary motions on condition that the court examine and consider the briefs and records of the prior appeal in the same action and that the appellants receive full consideration of their substantive and procedural points, which condition evidently was not complied with resulting in an erroneous affirmance, have not the appellants been illegally deprived of their right to due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States; and does not the judgment conflict with the Law of the Land?

3. When the Court of Appeals has affirmed a District Court Order granting an unauthorized, unprovided

for, insupportable Motion of defendant to strike the Amendment to the Complaint, after the defendant has waived its right under the Federal Rules of Civil Procedure to plead to or otherwise defend the Complaint as amended, has that Court not so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision?

CONSTITUTIONAL PROVISION INVOLVED

The provision of the Constitution of the United States involved herein is the Fifth Amendment, the pertinent portion of which (U.S.C.A., Constitution, Amendments 1 to 13, p. 172) is as follows:

"Amendment V. Due Process of Law . . . nor (shall any person) be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

In Cincinnati, Ohio, the late George H. Vant, decedent-insured, in 1920 made a written request of The Mutual Benefit Life Insurance Company, respondent-insurer, to deliver to his beneficiaries upon his death an Interest Income Certificate in the amount of $25,000.00. Upon Mr. Vant's death in 1931, the Interest Income Certificate was delivered to the petitioners herein, his widow, Ada J. Vant, and his son, Walter J. Vant, at Cincinnati, Ohio. Soon afterwards your petitioners moved to Pittsburgh, Pennsylvania, where they have resided for more than twenty years.

It is admitted that your petitioners are the sole owners of the Interest Income Certificate, which provides that Ada J. Vant receive the income therefrom for her life and Walter J. Vant (after January 1, 1943) receive the principal amount thereof upon her death.

After the petitioners had held the Interest Income Certificate for about twenty-five years, they agreed to merge their respective interests and obtain outright payment of the principal amount from the respondent. They were advised that they had the legal right to do so for any reason or for no reason at all; that the respondent was a mere depository, not a beneficiary of the decedent-insured, with no legal right whatever to object; and that the respondent had already made large profits on the income as well as exhorbitant capital gains on the principal, and that they themselves could and should have the benefit of such future profits and gains. Accordingly, they notified The Mutual Benefit Life Insurance Company of their agreement to merge their interests and requested outright payment of the principal amount, but their requests were repeatedly refused.

The action which followed was before the Court of Appeals in two different appeals, the first appeal at No. 12408 being reported in 255 F 2d 263 and the subsequent one at No. 12777 being reported in 262 F 2d 803.

The Proceeding in the Court of Appeals at No. 12408

The petitioners' suit was brought in the District Court at No. 15455, with jurisdiction based upon diversity of citizenship and an amount in excess of $3,000.00 exclusive of interest and costs (R. 2a). In the Complaint (R. 2a-5a) it was alleged, *inter alia,* that petitioners are the sole owners of the Interest Income Certificate (R. 6a-7a) which does not have imposed upon it any of the restrictions of a spendthrift or other trust pertaining to anticipation, attachment and invasion; that petitioners had agreed to merge their respective interests therein; and that the respondent arbitrarily and unlawfully refused to pay them upon demand.

There being no genuine issue as to any material fact, the case came on to be heard before District Judge Herbert P. Sorg on defendant's Motion to Dismiss Under Rule 12(b)(6) (R. 7a) and Plaintiff's Motion for Summary Judgment pursuant to Rule 56 (R. 8a). It was authoritatively argued before Judge Sorg that no matter which interpretation he might place upon the Interest Income Certificate (R. 6a-7a),—simple trust, chose in action, contract, *et cetera,*—he nevertheless had no legal alternative but to deny the motion to dismiss and to grant the motion for summary judgment. No applicable legal authority to the contrary was submitted. But Judge Sorg entered an Order (R. 8a), unaccompanied by an Opinion, in which he granted the motion to dismiss for the reason that the defendant is performing the contract of insurance in accordance with its terms. Obviously, Judge Sorg had overlooked or misapprehended the basis and purpose of the action because perform-

ance by the defendant is not in issue, the only issue being the right of the plaintiffs to agree as they did and obtain outright payment (R. 9a).

On appeal from said Order, the Court of Appeals (Kalodner, Staley and Hastie, Circuit Judges) affirmed (App. 6), but on a different ground, thus in effect reversing the decision of District Judge Sorg. In affirming, Circuit Judge Hastie opined (App. 3-6) that the Interest Income Certificate constituted a simple trust, the only citations by said jurist bearing on that point (App. 4-6). Although Judge Hastie was correct in interpreting the instrument as a simple trust, the only cases (a New York State case and an Indiana State case) which he erroneously considered on that point were not at all applicable, with the result that his conclusion was contrary to law. Judge Hastie even went so far as to state, "Whether or not Pennsylvania would adopt this view in an appropriate case we do not attempt to say" (App. 6); and, needless to say, the learned Judge likewise did not attempt to explain why this would not be an appropriate case. However, in order to make certain that Judge Hastie could give your petitioners full consideration, if he would, the unquestionably applicable Pennsylvania authorities were promptly submitted in the Petition for Rehearing which readily made it manifest that your petitioners had the legal right to waive the trust and obtain payment of their money divested of the trust. Nevertheless, on May 16, 1958, an Order, unaccompanied by an Opinion, was entered by Judge Hastie denying the Petition for Rehearing.

On May 20, 1958, promptly after the entry of said Order, there was filed on behalf of plaintiffs in the Dis-

trict Court an Amendment to the Complaint; and on May 27, 1958, a Motion to strike the amendment was filed, to which plaintiffs' Response was filed on May 29, 1958.

The day after the filing of said Amendment to the Complaint your petitioners had filed in the Court of Appeals a Motion for Leave to File Supplemental Appendix and Motion for Reconsideration in order to have the Amendment to the Complaint included in the record on appeal and to have the Court reconsider the appeal in the light of the amendment. Filed for the respondent was an Answer thereto, followed by a Reply to the Answer. The said motion showed that the amendment was properly filed in the only forum for establishing the record; that it was allowable as of course pursuant to Rule 15(a) of the Federal Rules of Civil Procedure; that it conformed to the Opinion of the Court of Appeals, which opinion made it *res judicata* that the issuance of the Interest Income Certificate created a simple trust whereby the defendant became a trustee of the $25,000.00 for the benefit of Ada J. Vant as life tenant and Walter J. Vant as remainderman; that by the amendment plaintiffs had specifically averred that they agreed to and did waive the trust and demanded payment divested of the trust; and that under the law they had the right to do so (In Re Henderson's Estate, 15 Phila. 598, 39 L.J. 450; Sharpless's Estate, Mendenhall's Appeal, 151 Pa. 214, citing with approval Yerkes's Appeal, 2 Chester Co. Reports 410, and followed in Owen's Estate, 15 Pa. Co. Ct. Reports, 196). The Answer thereto alleged, contrary to the law, that the amendment should not have been filed "without leave of court or written consent of defendant", when it is a matter of record that a responsive

pleading has never been filed; that it was untimely, when the record shows that it was filed one day after notice of the decision of the Court of Appeals; that it was not in conformity with the decision of the Court of Appeals, adding the likewise impertinent assertion that the Order of affirmance "contained no permission or suggestion of leave to file an Amended Complaint"; and that the amendment consisted of an erroneous conclusion of law that could not support the complaint, an untenable contention. The Reply to the Answer made it plain that the Answer was wholly without merit and that the motion was fully supported, leaving the Court of Appeals no legal alternative but to reverse with instructions that summary judgment be entered for plaintiffs.

On June 9, 1958, Judge Hastie for the Court of Appeals entered an Order, unaccompanied by an Opinion, that leave to file the supplemental appendix (Amendment to the Complaint) and the motion for reconsideration be granted; and that the motion for reconsideration be denied. Following this Order, on August 15, 1958, the mandate of the Court of Appeals was filed in the District Court, where the case proceeded before District Judge Sorg on September 3, 1958, on defendant's motion to strike the amendment and plaintiffs' response thereto.

The Proceedings in the Court of Appeals at No. 12,777

On October 9, 1958, District Judge Sorg entered an Order, unaccompanied by an Opinion, that plaintiffs' Amendment to the Complaint be stricken, with full knowledge on his part that it conformed to the Opinion of the Court of Appeals; that the Court of Appeals had ordered it to be included as part of the Record; that there is no provision in the Rules for such a motion to strike; and that the defendant had already waived its right under the Rules to plead or otherwise defend the amendment, leaving the jurist no legal alternative but to enter summary judgment for the plaintiffs.

From the said judgment your petitioners appealed, and the respondent presented in the Court of Appeals a Motion to Dismiss Appeal, Or, In The Alternative, To Assess Costs And Attorneys' Fees, in opposition to which was presented an Answer and Motion to Remand. The said motion to dismiss the appeal or, in the alternative, to assess costs and attorneys' fees was based upon respondent's insupportable and untenable proposition that "This appeal is without merit on its face and is frivolous and vexatious". Petitioners' Answer thereto showed that the appeal was wholly meritorious and that it was the respondent's motion which was frivolous and vexatious. The countering Motion to Remand should have been granted because it was apparent from the record that there was no genuine issue as to any material fact and summary judgment for plaintiffs should be ordered as a matter of law.

In the course of oral argument on said motions before the Court of Appeals (Biggs, Chief Judge; and

McLaughlin and Hastie, Circuit Judges), it became apparent that the merits of the appeal were being argued, the respondent admitting that the Order of Judge Sorg granting the motion to strike was an appealable order; further that the motion to dismiss the appeal, or, in the alternative, to assess costs and attorneys' fees must be denied as it subsequently was denied. Accordingly, it was stipulated in open court that the case should stand submitted on the merits of the appeal as well as on the preliminary motions, on the condition that the appellants receive full consideration of their substantive and procedural points and particularly a discussion of their said authorities cited in support of the substantive issue before the Court, which issue is the right of appellants to merge their respective interests in the Interest Income Certificate and to be paid the principal outright. The Court of Appeals denied the motions and affirmed the judgment (App. 2).

The Petition for Rehearing showed beyond question that the Circuit Judges overlooked or misapprehended the entire appeal, and yet that petition was denied in an Order, unaccompanied by an Opinion, entered by Judge Hastie. Then a Motion for Argument of Appeal on the Merits was presented in which your petitioners contended that the above mentioned condition attached to the oral stipulation made in open court relating to full consideration of the appeal was not complied with and as a result they in effect were denied their right of appeal. Furthermore, the said motion argued how discriminatory as well as erroneous was the judgment. Nevertheless, that motion was denied on March 11, 1959, in an Order, unaccompanied by an Opinion, entered by Judge Hastie. Hence, the instant petition.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Judgment Sought To Be Reviewed Conflicts With The Law Of The Land.

Without fear of contradiction, your petitioners contend not only that there is no legal authority for the prosecution of such a motion to strike as was granted by the District Court and sanctioned by the Court of Appeals, but also that there is no legal precedent therefor. The Federal Rules of Civil Procedure do not provide for such practice, and the Judges are bound by the Rules as by an Act of Congress. *Foltz v. Moore-McCormack Lines, Inc.*, 19 F. R. D. 301 (1956), (Cf. 28 U.S.C., sec. 2072).

Pursuant to the Rules, the only way the respondent could have pleaded to or otherwise defended the Amendment to the Complaint would have been by an Answer or by a Motion to Dismiss, the same as defending a Complaint. Because of the respondent's failure to have proceeded under the Rules, it has waived its right to do so. This is the Law of the Land, upheld in the various circuits including the Third Circuit, until the Third Circuit entered the instant conflict. *Van Sant v. American Express Co.*, 169 F. 2d 355 (C.C.A. 3, 1948).

Under Rule 7(a) respondent could have filed an Answer. Rule 8 provides the General Rules of Pleading, fully complied with by petitioners, and if respondent wanted to plead an affirmative defense, it should have been pleaded specially under Rule 8(c). Under Rule 12(a), a defendant shall serve his answer within 20 days after the service of the Complaint. Under Rule 12(b) every defense, in law or fact, to a claim for

relief in any pleading shall be asserted in the responsive pleading thereto if one is required, except that certain defenses may at the option of the pleader be made by motion. Under Rule 12(h) a party waives all defenses and objections which he does not present either by motion as hereinabove provided or, if he has made no motion, in his answer or reply. The respondent herein did not comply with any of the foregoing Rules, ignoring all of the applicable Rules. If the respondent thought that it could find support for such a motion to strike in Rule 12(f), then attention must be directed to the point that the motion does not contain any averment that the amendment contains scandalous matter, and further that the averments in the motion would justify a pleading only under Rule 8(c) or Rule 12(b) but then only under appropriate circumstances. Rule 12(f) provides only that the Court "may order *stricken from any pleading* any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" (Italics supplied). Of course, such was not the averred purpose of the defendant's Motion to strike.

It is respectfully submitted that in the instant action no pleading or defense to the Amendment to the Complaint is warranted. Pursuant to Rule 56, there being no genuine issue as to any material fact, summary judgment for plaintiffs should be granted as a matter of law. *S M S Mfg. Co. v. U. S.-Mengel Plywoods, Inc.*, 219 F. 2d 606 (C.C.A. 10, 1955), held that if it affirmatively appears from the record that there is no genuine issue as to any material fact, the case is appropriate for disposition by summary judgment, and it becomes the duty of the Court to enter such judgment under Rule 56. Actually, there are so many authorities in support

of the same point, the proposition should be considered elementary.

By its failure to plead under Rule 8(c), the respondent has waived every affirmative defense pursuant to Rule 12(h). *Van Sant v. American Express Co., supra,* is authority for the point that defenses by way of confession and avoidance must be pleaded under Rule 8(c), otherwise they are waived pursuant to Rule 12(h), and then are not allowable subsequently by amendment. Entirely applicable herein is the holding in *Black v. Shondell,* 174 F. 2d 567 (C.C.A. 8, 1949), that the defendant waived the defense that the petition did not state a claim upon which relief could be granted by failing to present that defense either by answer or by motion as required by Rule 12(b). Where the defense of lack of jurisdiction of the person is not raised by motion before answer or in the answer itself, the defense is waived by Rule 12(h), not because of the defendant's voluntary appearance, but because of his failure to assert the defense within the time prescribed by this rule. *Ginn v. Biddle,* 60 F. Supp. 530, E.D. Pa. (1945). Where it was stipulated that essential elements conferring general jurisdiction on District Court were present, and defendant corporation entered no plea or objection of improper venue, any right defendant corporation might have had to be sued in another district was waived. *Acadian Production Corp. v. Land,* 136 F. 2d 1 (C.C.A. 5, 1943). Subdivision (h) of Rule 12 intends that any defense permitted to be made by motion at option of defendant, and which is not raised either by motion or by answer, will be deemed to have been waived. *Phillips v. Baker,* 121 F. 2d 752 (C.C.A. 9, 1941), certiorari denied 314 U.S. 688.

2. The Judgment Sought To Be Reviewed Has Deprived Petitioners Discriminatorily Of Their Right To Due Process Of Law.

The Fifth Amendment to the Constitution of the United States guarantees petitioners that they shall not be deprived of their property without due process of law. The judgment to be reviewed (App. 2) has deprived your petitioners of property rights including, but not limited to, the following: (A) the right to outright payment of the principal amount of the Interest Income Certificate so that henceforth they will receive the benefit of all capital gains and the full income therefrom; (B) the right to litigate with due process of law to prevent the deprivation of said right; (C) their legal right to equal protection and application of the Federal Rules of Civil Procedure; and (D) their right to full consideration of the issues and legal points raised in their appeal.

A. Petitioners Have Been Deprived of the Right to Full Use and Enjoyment of their Interest Income Certificate.

After the filing of the Amendment to the Complaint and the Motion to strike it, there was no legal barrier to the entry of summary judgment for the plaintiffs. As a matter of fact and of law, there was no legal barrier thereto after the filing of the original Complaint. There is no point in arguing about District Judge Sorg's dismissal of the Complaint on his unsupported and insupportable Order, because it could only have meant that he would not let the plaintiffs win and he would not let the defendant lose. However, when that Order came before the Court of Appeals for review, Circuit Judge Hastie

correctly limited his discussion to the simple trust theory (App. 4-6). But in connection therewith, the jurist went overboard into New York State Court for an inapplicable case (App. 4) and then went out of bounds into Indiana State Court for another inapplicable case (App. 5), wondering "whether or not Pennsylvania would adopt this view" (App. 6). Therefore, the applicable Pennsylvania cases were promptly submitted in the Petition for Rehearing, informing Judge Hastie that Pennsylvania had adopted the view of appellants as early as 1882, and still maintains it. Why then, upon rehearing, did not Judge Hastie allow your petitioners their legal rights? Was Judge Hastie actually prejudiced, or simply indifferent? To make certain that there was full knowledge of the matter on Judge Hastie's part, the motion for reconsideration in the light of the Amendment to the Complaint was submitted, but to no avail. As a result, the only constructive and productive thing about Judge Hastie's Opinion (App. 3-6) is that it settled the interpretation of the Interest Income Certificate as a simple trust. Even this was enough to encourage petitioners about the further proceedings before District Judge Sorg on the Amendment to the Complaint, because (1) it was *res judicata* by the Court of Appeals that the applicable theory was the simple trust, (2) the Court of Appeals had ordered the amendment included as part of the Record, (3) the amendment conformed to the Opinion of the Court of Appeals, and (4) the Complaint, as amended, was patently sufficient and legally supported. Why then did Judge Sorg grant the motion to strike? Any Judge who would enter such an Order, can be expected to make any departure from the accepted and usual course of judicial proceedings. No

wonder his Order was not accompanied by an Opinion —again.

B. Petitioners Have Been Deprived of their Right to a Day in Court.

It is obvious that petitioners have not been allowed their right to be heard in advance of judgment, as contemplated by the Rules and applicable law, as well as by the Constitution. With due process of law, they would have obtained judgment.

C. Petitioners Were Denied Equal Protection of the Federal Rules.

It is well settled under the Rules that by its failure to serve as Answer or a Motion to Dismiss within 20 days after the filing of the Amendment to the Complaint, the respondent waived its right to do so. It is just as well settled that by its motion to strike, the respondent did not legally defend the amendment, the motion being a nullity. Therefore, it was discriminatory for District Judge Sorg to misapply the Rules and fail to enter summary judgment for plaintiffs and likewise for the Court of Appeals to have sanctioned the action.

D. Petitioners Were Denied Judicial Consideration and Review of their Cause.

District Judge Sorg's failure to file legal Opinions with his Orders makes it evident that he denied petitioners judicial consideration. The jurist has a right to be wrong; but he has a concomitant duty to be sincere. Therefore, regardless of whether his conclusions are erroneous or legal, to keep above suspicion the jurist is obliged to enter Opinions which make it plain that he

has at least considered all points and discussed all authorities, including those submitted by the losing parties. Otherwise, there is justification for exercise of the right to criticize. In disposing of the proceedings below as was done by District Judge Sorg and by Circuit Judge Hastie and his associates, Canons of Judicial Ethics were violated, their being a grave doubt about their having violated Canon 1, Relations of the Judiciary; Canon 2, The Public Interest; Canon 3, Constitutional Obligations; Canon 5, Essential Conduct; Canon 6, Industry; Canon 14, Independence; Canon 19, Judicial Opinions; Canon 20, Influence of Decisions Upon the Development of the Law; Canon 22, Review; and Canon 34, Summary of Judicial Obligation.

On appeal, your petitioners had the same problem again with Circuit Judge Hastie and his associates. Their opinion (App. 1-2) did not cite a single case. They simply brushed off the appeal through stating "The district court was correct in its interpretation of the meaning and effect of our decision on the first appeal" (App. 2), a most impertinent observation, because the issues on the two appeals were quite different. What is more serious, it is apparent in their Opinion that after the case was argued before them on two appeals, they still do not know what the issues are. No wonder that citizens become discouraged with expending time, effort and money in litigation, and then disgusted with the unjust results,—proclaiming "There is no justice!" Judging from their Opinion (App. 2), the Circuit Judges erroneously think that your petitioners wanted "equitable intervention overriding the arrangement made by the insured with the insurance Company for the deferment of payment of the proceeds of the insurance policy".

(App. 2). This positively is not the case. **The arrangements made by the insured with the insurance company have never been a subject for consideration in the proceedings below, because the insurance contracts went out of existence upon the death of the insured at which time a new and separate thing came into existence—the Interest Income Certificate.** They even based their adjudication on the false premise that appellants have not alleged a theory of trust (App. 2), when that is specifically averred in the Amendment to the Complaint which they ordered included in the Record and which was the primary substance of the appeal.

In the first appeal, the issue was substantive, involving the right of petitioners to waive the simple trust created thereby and obtain outright payment of the principal amount. *In the second appeal,* the issues were procedural, involving denials of due process of law. Although petitioners have argued that they were denied full consideration of the issues and legal points raised in their appeal, they actually did not receive any consideration. The best evidence of this enlarged contention is the Opinion (App. 1-2) of the court of "appeals".

3. The Court Of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings, And So Far Sanctioned Such A Departure By The District Court, As To Call For An Exercise Of This Court's Power Of Supervision.

This consideration governing review on certiorari is set forth in paragraph 1(b) of Rule 19 of the Rules of this Honorable Court. Furthermore, this Court has held that Courts of Appeals have supervisory control and should exercise it, in the case of *La Buy, United States*

District Judge, v. Howes Leather Co., Inc., et al., 352 U. S. 249, affirming 226 F. 2d 703 (C.C.A. 7, 1957). Mr. Justice Clark stated in the majority opinion (pp. 259-260) that, "Supervisory Control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the Federal system".

The record herein is replete with such incredible departures by the District Court, sanctioned by the Court of Appeals.

Why was District Judge Sorg so anxious to deny petitioners their rights herein that be ordered the Amendment to the Complaint stricken after the Court of Appeals had ordered it included in the Record?

Why were Circuit Judge Hastie and his associates so anxious to sanction Judge Sorg's said denials that they sanctioned his overruling their said order?

CONCLUSION

In view of the foregoing, particularly the willingness of the Court of Appeals to permit the District Court to reverse it on the issue of whether the amendment be part of the record, this Honorable Court should be alerted to the need for judicial review and grant this petition for writ of certiorari.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioners.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,777

ADA J. VANT AND WALTER J. VANT,
Appellants
v.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, A CORPORATION.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued December 15, 1958

Before: BIGGS, *Chief Judge;* and MCLAUGHLIN and HASTIE, *Circuit Judges.*

Opinion of the Court

(Filed December 31, 1958)

PER CURIAM.

When this matter came before us for hearing on appellee's motion to dismiss the appeal and the countering motion of appellants to remand with instructions, it became apparent that counsel for both parties were addressing themselves, in substantial part at least, to the merits of the issue presented by the appeal. Accordingly, it was stipulated in open court that at the conclusion of argument the case should stand submitted on the merits of the appeal as well as on the motions. In this connection counsel for appellant strongly urged the relevancy of briefs and records on the prior appeal on this

case. Vant v. Mutual Benefit Life Ins. Co., 1958, 255 F.2d 263. We have examined and considered these items.

This litigation is an effort of a widow and her son, beneficiaries of a policy of insurance on the life of their deceased husband and father, to obtain immediate payment of the entire proceeds of this life insurance policy, although the policy itself expressly provided for the payment of interest on the principal sum to the widow during her lifetime and the entire proceeds to the son on her death. Originally, the case was submitted in the trial court on the plaintiffs' motion for summary judgment and defendant's motion to dismiss. Final judgment was entered dismissing the complaint. On appeal we affirmed.

After our remand to the district court the plaintiffs filed an amendment to their original complaint alleging in substance that the defendant is in legal contemplation a trustee of the fund in controversy for the plaintiffs. This theory was not spelled out in the original complaint. Believing that our appellate ruling required the same result whether the complaint presented a contractual or a trust theory of liability, the district court, on motion, struck this amendment. This appeal followed.

The district court was correct in its interpretation of the meaning and effect of our decision on the first appeal. It was and is our view that appellants have not alleged or shown justification, whether on a theory of trust or otherwise, for equitable intervention overriding the arrangement made by the insured with the insurance company for the deferment of payment of the proceeds of the insurance policy.

The motions will be denied and the judgment will be affirmed.

(Same Caption)

Opinion at No. 12,408

Argued March 21, 1958

Before KALODNER, STALEY and HASTIE, Circuit Judges

Opinion filed April 30, 1958.

HASTIE, Circuit Judge.

On March 23, 1920, the late George H. Vant amended the settlement provision of his application to the defendant for insurance in the amount of $25,000 on his life. In accordance with that amendment, policies were issued to provide in relevant part that on the death of the insured, the defendant would hold the proceeds, pay the widow interest at 3% per year for life, and upon her death pay the son interest at the same rate until January 1, 1943, and then pay the son the entire amount of the proceeds. The application directed that "the right of the withdrawal is to be withheld from my said Wife during her lifetime, and is also to be withheld from my said Son until January 1, 1943."

When the insured died, the defendant issued a $25,000 "interest income certificate" wherein it formally undertook to make payments to the widow and son in accordance with the terms of the policy. After January 1, 1943, the widow and son, both living, contracted to "merge their interests" for the purpose of receiving the proceeds immediately and outright. The defendant refused to pay other than by the terms of the insurance agreement. Thereupon, the widow and son brought this action, basing jurisdiction on diversity of citizenship, seeking to compel a present lump sum payment. The defendant moved to dismiss under Fed.Rules Civ.Proc. Rule 12(b) (6), 28 U.S.C., for failure to state a claim

upon which relief can be granted, and the plaintiffs moved for summary judgment under Rule 56. The plaintiffs' motion was denied, the defendant's motion was granted, and accordingly the district court ordered the action dismissed. This appeal by the plaintiffs followed.

The plaintiffs attempt to effect a nullification of the method of disposition of the proceeds as formulated by the deceased and incorporated in the insurance contract. There is some dispute whether an insurance company in this situation can be considered as a trustee so as to permit a court of equity to direct an anticipation of the agreed distribution. See the opinions in Re Nires, 1943, 290 N.Y. 78, 48 N.E.2d 268, 145 A.L.R. 1368; and see the comprehensive review and analysis in 1 Scott, Trusts, 2d ed. 1956, § 87.1. Even assuming the power to exist, the court will exercise it only in rare instances.

> "The court will not, however, authorize or direct the trustees to apply for the support of the beneficiary income which by the terms of the trust it was validly provided should be accumulated for him, or to apply principal for his support when such use of the principal is not authorized by the terms of the trust, unless the needs of the beneficiary are such as to require a deviation from the terms of the trust." See 2 Scott, Trusts, 2d ed. 1956, § 168 at 1187; Restatement, Trusts, §§ 167, 168.

These authorities make it clear that the court is but undertaking to do what it thinks the deceased would have provided had he anticipated the eventualities which occurred. If the trust was set up to provide for needs of the beneficiary, and circumstances have changed to such a degree as to make the trust ineffective to secure

that purpose, courts have deviated from express terms to accomplish the basic general purpose of the instrument. As long as the circumstances remained unchanged, however, it must be assumed that the deceased contracted to frustrate demands for payment sooner than he had provided. Interference by a court in this situation would have no equitable basis. It might well be viewed as a merely arbitrary interference with liberty of contract.

In this case, the insured chose one of a variety of permissible methods of disposing of the proceeds of his insurance policy. The plan he formulated is now in effect. The plaintiffs neither alleged nor indicated that they would attempt to prove any change of circumstances other than the agreement of the beneficiaries to merge their interests and demand immediate payment. To the contrary, by moving for summary judgment they have conceded that the only issue in the case is whether this agreement alone is sufficient reason to require the insurer to pay the beneficiaries sooner than the insured wanted and directed that they be paid. Elliott v. Travelers Ins. Co., 1951, 121 Ind. App. 400, 99 N.E.2d 274, discussed and approved in 1 Scott at page 674, is nearly directly on point. There the deceased left the proceeds of his life policy with the insurance company to pay 3½% interest per year to one appellant for life, and at death to pay the corpus to the other appellants. The appellants agreed to receive the payment immediately, claiming that the cost of living had increased so much as to make the "trust" moribund. The court denied the appellants' claim on the ground that the intent of the deceased, far from being disregarded, was being precisely followed. As Scott observes: "[I]n the absence of any exigency

there is no reason for deviating from the arrangement made by the insured with the company."

We are aware that the view propounded by Professor Scott—that under the proper circumstances, the court will treat the insurance company in the same way as a trustee—has been influential to the extent that it has been introduced into the Restatement of Trusts. See, § 12, comment gg (1948 Supp.) and comments thereto. Whether or not Pennsylvania would adopt this view in an appropriate case we do not attempt to say. For the present complaint and the motions upon which the case was submitted for final decision present for adjudication merely the question whether two beneficiaries can at their pleasure so "merge their interests" as to receive immediately and in full that distribution of proceeds which under the insurance contract was to be deferred. This we hold they cannot do.

The judgment will be affirmed.

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IN THE

Supreme Court of the United States

NO. 824

OCTOBER TERM, 1958

ADA J. VANT and WALTER J. VANT, Petitioners,

v.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION AND APPENDIX

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

CARL E. GLOCK
Counsel for Respondent

747 Union Trust Building
Pittsburgh, Pennsylvania
May 9, 1959

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

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IN THE

Supreme Court of the United States

NO. 824

OCTOBER TERM, 1958

ADA J. VANT and WALTER J. VANT, Petitioners,

v.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

QUESTION PRESENTED

Whether an amended complaint was not properly stricken where it had been filed—without leave of court or consent of the defendant—after an unqualified affirmance by a court of appeals of a district court's dismissal of the action and where it contained only insufficient matter already considered by both courts.

RULES OF CIVIL PROCEDURE INVOLVED

RULE 12.

DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS

* * *

"(f) **Motion to Strike.** Upon motion made by a party before responding to a pleading or, if no respon-

sive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

RULE 15.

AMENDED AND SUPPLEMENTAL PLEADINGS

* * *

"(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . ."

RULE 60.

RELIEF FROM JUDGMENT OR ORDER

* * *

"(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrep-

resentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . ."

STATEMENT OF THE CASE

This litigation arises out of an effort by the beneficiaries of a policy of insurance upon the life of their deceased husband and father, to force immediate payment of the proceeds of a policy, which provided that only interest on the principal sum should be paid during the widow's lifetime and that the proceeds be paid to the son on her death. The payment provision of the policy was at the request of the insured, who stipulated that the right of withdrawal must be withheld from his wife during her lifetime (R. 2b). After the insured's death, the insurer issued a "certificate" wherein it formally undertook to make payments to the widow and the son in accordance with the terms of the policy. Sometime later, the widow and son, both living, contracted to "merge their interests" and demanded the proceeds immediately and outright. The insurer having refused to pay other than by the terms of the insurance agreement, the widow and son brought suit in the district court, basing jurisdiction on diversity of citizenship, seeking to compel a present lump sum payment of the insurance proceeds.

The defendant's motion to dismiss the complaint for failure to state a claim upon which relief could be

granted was granted in August 1957, and affirmed by the court of appeals in April 1958.

In the opinion which accompanied the judgment of the court of appeals, Judge Hastie discussed the quasi-trust theory under which some authorities have asserted that circumstances may exist which justify a departure from the method of disposition of the proceeds formulated by the deceased and incorporated in the insurance contract. He concluded such circumstances did not exist in the present case (App. 4-6). Plaintiff-petitioners erroneously assumed from this discussion that the court of appeals regarded the defendant-insurer as a formal trustee and in May 1958, served and filed an amended complaint in the district court (without leave of that court or consent of the defendant) by which they added to their claim the allegation that the defendant was a trustee.

Plaintiffs then asked the court of appeals for leave to make the amendment part of the record in the first appeal and on the basis thereof sought reconsideration of the affirmance of the judgment of dismissal. After full consideration, the court of appeals in June 1958, denied plaintiffs' motion for reconsideration. (App. 11)

In the meantime, the defendant had filed in the district court a motion to strike the amendment.[1] In October 1958, after the affirmance of the dismissal and the return of the mandate of the court of appeals, the dis-

---

[1] The suggestion in the petition that the motion to strike is unauthorized or amounted to a waiver by defendant of its right to plead or otherwise defend (p. 3) disregards the provisions of Rule 12 of the Federal Rules of Civil Procedure.

trict court granted defendant's motion to strike. Plaintiffs filed notice of appeal. After the appeal was docketed, the defendant filed a motion to dismiss the appeal and to assess costs and attorneys' fees under the provisions of 28 U.S.C. 1912.

At the argument of defendant's motion, it was stipulated by the parties that the argument should be treated as on the merits of the appeal, as well as on the motions.[2] Thereafter, the court of appeals affirmed the action of the district court, although refusing defendant's application for an award of costs. In affirming the second time, the court of appeals specifically disclaimed that it had held that the defendant was a trustee and expressly held that neither the original complaint nor the amended complaint stated a claim on which relief could be granted.

Petitioners seek review by this Court of the judgment of the court of appeals affirming the striking of plaintiffs' amended complaint.

---

[2] The statement in the petition (pp. 3, 11) that the submission as on the merits was conditioned in any way is a misstatement. (Minutes of Proceedings before Court of Appeals on December 15, 1958, Appendix, 9)

ARGUMENT

The underlying holding in this case is that the beneficiaries of an insurance policy cannot, at least by their mere agreement to do so, force an insurer to violate a compact with its policyholder as to the distribution of the proceeds of the policy. There is no decision of this Court dealing with this problem. The holdings of the Court of Appeals of the Third Circuit in this case, however, are the latest in a line of authorities unanimously supporting this proposition: Annotation, 145 ALR 1374, *Life Insurance Benefits As within Power of Courts to Hasten Enjoyment of Trust Funds; Re Nires*, 290 N. Y. 78, 48 N.E. 2d 268 (1943); *Pierowich v. Metropolitan Life Insurance Company*, 282 Mich. 118, 275 N. W. 789 (1937); *McLaughlin v. Equitable Life Assurance Society*, 112 N. J. Eq. 344, 164 Atl. 579 (1933); *Petition of Travers*, 177 Misc. 1044, 32 N.Y.S. 2d 742 (1941); *Elliott v. Travelers Insurance Co.*, 121 Ind. App. 400, 99 N.E. 2d 274 (1951).

The want of merit in plaintiffs' claim of itself supports the action of the lower courts. In *Barnet & Craig v. Muncie National Bank*, 98 U.S. 555 (1878), this Court stated:

> "An issue ought not to be tried where it would be a sheer mistrial and a mere waste of time. The court ought *sua sponte* to strike it out or disregard it."

Apart from the lack of merit in plaintiffs' claim, striking the amendment was proper because of the unorthodox manner in which plaintiffs chose to proceed in filing an amendment without leave of court or consent of the defendant, after the dismissal of the action

had been affirmed unconditionally by the court of appeals and after the very matters contained in the amendment had in effect been declared to be insufficient by the court of appeals.[3] This court has expressed its disapproval of the practice of filing additional pleadings without leave of court in an effort to reopen a case and to relitigate matters already decided by earlier appeals: *Stewart v. Salamon*, 97 U. S. 361 (1878).

In such circumstances, the district court had no choice but to strike the amendment. It lacked power to permit the amendment, had an application been made to it: *Kelly v. Delaware River Joint Commission*, 3 Cir., 1951, 187 F.2d 93; *Butcher & Sherrerd v. Welsh*, 3 Cir., 1953, 206 F.2d 259; *Ginsburg v. Stern*, 3 Cir., 1957, 242 F.2d 379; *Carpenter v. Rohm & Haas Co., Inc.*, 3 Cir., 1950, 180 F.2d 749. These decisions do not conflict with the decisions of other circuits in any respect material to this petition and conform to the pronouncements of this Court. Even meritorious matter may be stricken from a pleading unless presented in an appropriate manner and at the proper time to a tribunal having the right to pass upon it: *Harrison v. St. Louis and San Francisco Railroad Company*, 232 U. S. 318, 333 (1913).

The judgment of the court of appeals which petitioners ask this Court to review, is not in conflict with any decision of this Court and does not involve any important question of federal law. It is consistent with the decisions of other courts, both state and federal,

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[3] Plaintiffs had argued their "trust" theory to the court of appeals in unsuccessful motions for rehearing (denied May 16, 1958) and for reconsideration (denied June 9, 1958).

which have passed upon the substantive and procedural problems involved. The only departure from the accepted and usual course of judicial proceedings in this case has been by the petitioners.

Certiorari should be denied.

Respectfully submitted,

CARL E. GLOCK
GILBERT J. HELWIG
REED, SMITH, SHAW & MCCLAY
Counsel for Respondent

APPENDIX.

12777

ADA J. VANT and WALTER J. VANT, Appellants

vs.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation

ARGUED:

(Motion by appellee to dismiss appeal and/or in the alternative, to assess costs and attorneys' fees)

Gilbert J. Helwig, Esq., opens in support of motion. (States in answer to Chief Judge Biggs inquiry that costs are $500 and that he seeks both dismissal and costs)

Paul Ginsburg, Esq., opens in opposition to appellee's motion and in support of appellants' motion to remand with directions to grant plaintiffs' motion for summary judgment.

Chief Judge Biggs asks counsel whether they would be willing to treat this argument as one on the merits of the appeal as well as on the motions. Mr. Helwig says yes. Mr. Ginsburg says he will stipulate provided the court will consider the briefs in the prior appeal. Chief Judge Biggs will not accept the stipulation subject to conditions. Mr. Ginsburg says he will stipulate without qualification in the interests of expedition that the appeal may be determined on the merits.

c.a.v.

Order of May 16, 1958, Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,408

ADA J. VANT and WALTER J. VANT,
Appellants,
v.
THE MUTUL BENEFIT LIFE INSURANCE COMPANY, a corporation.

SUR PETITION FOR REHEARING

Present: KALODNER, STALEY and HASTIE, Circuit Judges

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court

WILLIAM H. HASTIE
Circuit Judge

Dated: May 16, 1958

Order of June 9, 1958, Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12408

ADA J. VANT and WALTER J. VANT,
Appellants,
v.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation

Present: KALODNER, STALEY and HASTIE, Circuit Judges

Upon consideration of appellants' motion for leave to file a supplemental appendix and motion for reconsideration of the above entitled appeal in the light of the supplemental appendix, and of the appellee's answer, and of the appellants' reply to appellee's answer.

It is ORDERED that leave to file the supplemental appendix and the motion for reconsideration be and it is hereby granted;

It is Further ORDERED, after full consideration of the supplemental appendix and the motion for reconsideration and the reply to the answer, that the motion for reconsideration be and it is hereby denied.

By the Court,

WILLIAM H. HASTIE
Circuit Judge

June 9, 1958

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MAY 12 1959
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 824

ADA J. VANT and WALTER J. VANT, Petitioners,

v.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation, Respondent.

PETITIONERS' REPLY BRIEF

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

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OCTOBER TERM, 1958

NO. 824

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v.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation, Respondent.

PETITIONERS' REPLY BRIEF

In the respondent's brief in opposition, there is an attempt in the counter question presented (p. 1) to impress this Honorable Court with the false impression that the Amendment to the Complaint was erroneously filed because "without leave of court or consent of the defendant". Nevertheless, it is readily obvious how untenable is this proposition from an examination of the opening clause of Rule 15(a) *quoted by respondent* (p. 2) which provides, "a party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . ."; and it is plain from the record that a responsive pleading has not been served and that the said amendment was the only one.

The inapplicability herein of Rule 12(f) quoted by respondent (pp. 1-2) is manifest from the discussion of the applicable Rules in Reason 1 for allowance of the writ (Petition 12-14).

The respondent's opening statement in its counter Statement of the Case (p. 3) is inaccurate, and yet respondent persuaded the lower courts that it was true. The petitioners are not "the beneficiaries of a policy of insurance upon the life of their deceased husband and father, . . ., which provided . . .". *The petitioners are the owners of an Interest Income Certificate.* In order to avoid the repetition of that misstatement before this Honorable Court, petitioners clarified those facts at the top of page 19 of the Petition in bold face type, as follows:

> **"The arrangements made by the insured with the insurance company have never been a subject for consideration in the proceedings below, because the insurance contracts went out of existence upon the death of the insured at which time a new and separate thing came into existence — the Interest Income Certificate."**

Contrary to respondent's footnote on page 5, it is respectfully submitted "that the submission as on the merits was conditioned". The minutes appended (p. 9) by respondent were not intended as a Transcript of the proceedings and are not. The only record to be considered on this point is the opening paragraph of the Opinion of the Court (App. 1-2), which is as follows:

> "When this matter came before us for hearing on appellee's motion to dismiss the appeal and the countering motion of appellants to remand with instructions, it became apparent that counsel for both parties were addressing themselves, in substantial part at least, to the merits of the issue presented by the appeal. Accordingly, it was stipu-

lated in open court that at the conclusion of argument the case should stand submitted on the merits of the appeal as well as on the motions. In this connection counsel for appellant strongly urged the relevancy of briefs and records on the prior appeal on this case. Vant v. Mutual Benefit Life Ins. Co., 1958, 255 F.2d 263. We have examined and considered these items."

An incidental correction of said minutes should change Attorney Helwig's statement from "costs are $500" to the "attorneys' fees" applied for by respondent (and refused) were $500.

This is the first time that the respondent has denied that the said submission was conditioned as stated in the petition (pp. 3, 11); and it was previously so alleged below in appeal No. 12,777 both in the Petition for Rehearing and in the Motion for Argument of Appeal on the Merits. However, this proposition of respondent is wholly without merit at any rate because the submission on the merits was necessarily conditioned as stated by petitioners if only by reason of the Canons of Judicial Ethics cited on page 18 of the Petition. In respondent's denying that the stipulated submission to the Court of Appeals on the merits was conditioned upon your petitioners receiving full consideration of all of their points and authorities based upon the entire record, is the respondent not advocating that your petitioners as appellants were not to receive full consideration of their appeal and all of their points and authorities based upon the entire record? *In other words, is not the respondent arguing that petitioners' contended denial of full con-*

sideration of their appeal was the result of respondent's own trick, and that the slick trick is not now reviewable?

The Order by Circuit Judge Hastie of June 9, 1958, appended (p. 11) by respondent shows that leave to file the supplemental appendix was granted. It consisted of the very Amendment to the Complaint which was subsequently ordered stricken by District Judge Sorg.

Respondent's entire Argument (pp. 6-8) can be disposed of by replying that the citations do not support the propositions, and the propositions are impertinent to the questions presented.

CONCLUSION

The respondent's opposing brief fails to comply with paragraph 1 of Rule 24 because it does not disclose "any matter or ground why the cause should not be reviewed by this Court."

Respectfully submitted,

PAUL GINSBURG
Counsel for Petitioners.

FILE COPY

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ADA J. VANT and WALTER J. VANT, Petitioners,

v.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation, Respondent.

PETITION FOR REHEARING

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

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OCTOBER TERM, 1958

NO. 824

ADA J. VANT and WALTER J. VANT, Petitioners,

v.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, a corporation, Respondent.

PETITION FOR REHEARING

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Ada J. Vant and Walter J. Vant respectfully represents:

First: On May 25, 1959, this Honorable Court denied the petition for writ of certiorari in the above entitled case. The petition sought review of judgments which deprived petitioners of their right to due process of law, in conflict with the Law of the Land, which judgments constitute such departures from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Incidentally involved was the right of petitioners to merge their life and remainder interests in an Interest Income Certificate and receive outright payment, but they never were able to obtain a legal adjudication of that issue because of the lower Courts' misapplications

of the Federal Rules of Civil Procedure and the applicable law.

Second: On May 18, 1959, the opinions of this Honorable Court were entered at No. 58 October Term, 1958, in the case of *Dick, Petitioner v. New York Life Insurance Co.* Mr. Chief Justice Warren delivered the opinion of the Court, and Mr. Justice Frankfurter the dissenting opinion. For purposes herein, it does not matter which opinion is the correct one in that case because both opinions support petitioners' right to certiorari in this case. It is respectfully submitted that one point raised in the dissenting opinion may (upon consideration out of context) have erroneously influenced the denial of certiorari herein one week later, because Mr. Justice Frankfurter was so vigorous in his position sanctioning the Evarts Act, that this Court should not adjudicate "cases that are important only to the litigants", and concurring with Mr. Chief Justice Taft explaining the "Judges' Bill" saying, "No litigant is entitled to more than two chances, namely to the original trial and to a review" by the Court of Appeals. It is obvious from the Record that neither one of those points is applicable to the instant petition; and that, on the contrary, it is the authorities cited in support of granting certiorari that should be considered on rehearing in this case.

Third: In the first place, the importance to the litigants of this case is incidental and subordinate to the importance to the public. Of primary importance is the right to litigate with due process of law; to be heard in advance of judgment; to the protection of the Federal Rules of Civil Procedure from Judges who whimsically and capriciously refuse to be bound thereby; to an ad-

judication of all points and issues; and to have the applicable law considered and upheld. If your petitioners would have been allowed these rights by the Judges below, then they could have obtained their right to immediate payment of their money from respondent, and there would not have been any need for *resort* to this Court. But the denial of all of these rights by the Judges below is so obvious of record, that in this case your Honorable Court is really one of *first resort* rather than *last resort*. Judging from the cases which counsel for your petitioners alone has lodged in this Court from the Third and other Circuits, it is readily apparent that the right of appeal is too often a sham and illusory; and this is undoubtedly the reason for this Court's supervisory power, an important substitute for the second resort. In the second place, therefore, if litigants do not get the two chances to which they admittedly are entitled before coming into this Court, then a fastidious regard for the honor of the fair administration of justice requires that this Court afford the second chance. Such assurance of a second chance, coupled with a real enforcement of this Court's supervisory power, is the surest way of reducing the overflow of petitions for certiorari, because the excessive flow of petitions into this Court should be blamed upon the Judges, not the litigants. Judges of Courts of Appeals have become so confident that they can discriminatorily dispense "justice" in whatever way they please, without fear of review, that litigants too often are really denied their second chance and are impelled to seek it in this Court. A review by this Court in such cases would indeed obviate the need for lawyers' hoping "to draw a prize in the lottery."

Fourth: **Because of a "weakness" in the Evarts Act, this Court was given discretionary power to grant certiorari; and Mr. Justice Frankfurter stated that it was held the certiorari power should be exercised "to secure uniformity of decision". Does not the security of uniformity of decision require the grant of certiorari in this case? Is there any uniformity in decisions holding**

that a judgment can be based on the law of New York and Indiana, when Pennsylvania law should be applied;

that a District Court can overrule a Court of Appeals;

that a Complaint can be defended by a motion to strike, when the Rules require an Answer or a Motion to Dismiss;

that a mandate from the Court of Appeals prevents further proceedings in the District Court pursuant to the Federal Rules of Civil Procedure and applicable law, even as to matters not within the compass of the mandate;

that a litigant cannot have his right to amend once under Rule 15(a);

that Courts can enter summary dismissals, in advance of the right to be heard, without adjudicating the issues and discussing authorities, and even without entering any Opinions at all?

Fifth: It is respectfuly submitted that when the certiorari power should be exercised to secure uniformity of decision, as in the instant case, it should not be denied because the case is incidentally important to the litigants.

Sixth: Even Mr. Chief Justice Taft, after saying that no litigant is entitled to more than two chances, went on to say the Supreme Court's function "is to preserve uniformity of decision among the intermediate courts of appeal". **Therefore, according to both the Evarts Act and the "Judges' Bill", certiorari should be granted in this case.**

Seventh: The *Erie* rule is the most compelling ground for granting certiorari in this case. When Circuit Judge Hastie rendered his opinion on the simple trust theory, he based it upon a New York State case (App. 4) and an Indiana State case (App. 5). The jurist then went on to opine that, "Whether or not Pennsylvania would adopt this view in an appropriate case we do not attempt to say" (App. 6). **It is obvious from the foregoing that, in a Pennsylvania case, Judge Hastie applied inapplicable law from two other States, and admittedly did not apply Pennsylvania law because (as he said) he did not know what it was.** Under *Erie R. Co. v. Tompkins*, 304 U. S. 64, Judge Hastie was required to apply Pennsylvania law in this case.

Eighth: Promptly after the entry of Judge Hastie's Opinion, your petitioners presented a Petition for Rehearing, submitting Pennsylvania authorities fully supporting their right as life tenant and remainderman to waive the trust, "merge their interests" and "obtain at their pleasure" the corpus outright; and, unlike Judge Hastie's citations, their authorities are pertinent to the issue *without* dispute and are entirely directly in point. In Philadelphia as far back as *In Re Henderson's Estate*, 15 Phila. 598, 39 L. I. 450, the Orphans' Court held analogously that although it is an active trust, yet it

may be terminated before the prescribed time at the request of the *cestuis qui trustent* who are *sui juris;* and that they have the right, as beneficial owners of the entire estate, to waive the trust and obtain the payment of the money divested of the trust. In *Sharpless's Estate, Mendenhall's Appeal,* 151 Pa. 214, the Pennsylvania Supreme Court upheld the law of *Yerkes's Appeal,* 2 Chester Co. Reports, 410, that (applied to the instant case) the chief object of the trustor was to preserve the corpus for his son, and that the son's conveyance of the remainder to his mother who was entitled to the income vested it in her, with the result that no valid reason appeared for the continuance of the trust. *Mendenhall's Appeal, supra,* is cited and followed in *Owens' Estate,* 15 Pa. Co. Ct. Reports, 196, which squarely supports appellants' position by holding that the merger of the life estate with the remainder executes the trust and the life tenant who purchased the remainder became entitled absolutely. In view of the foregoing, it is respectfully submitted that plaintiffs' complaint is supported by the rule of law in Pennsylvania.

Ninth: Did your petitioners ever have a chance? Their first "chances" were before District Judge Herbert P. Sorg who did not accompany his Orders with legal opinions because he could not. Their second "chances" were before the Court of Appeals that failed to adjudicate a single issue before it. Your petitioners now seek of this Honorable Court, in the interests of justice, a chance.

Tenth: This Honorable Court is invited to make a simple test of the reliability of the Court of Appeals by comparing its Opinions (App. 1-6) with the Record, to

see if the case and its issues can be recognized therefrom; then to compare its judgments with the issues to see if there has ever been an adjudication of a single issue properly before the Court. That is the most effective way in which this Honorable Court can ascertain that your petitioners have never had a chance.

Wherefore, your petitioners pray that this Honorable Court grant a rehearing.

PAUL GINSBURG,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay; and that it is restricted to the grounds specified in paragraph 2 of Rule 58.

PAUL GINSBURG,
Counsel for Petitioners.